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In the

Supreme Court of the United States

October Term, 1983

No. 83-328

James Mabry, Commissioner, Arkansas Department of Correction ..... *Petitioner*

V.

George Johnson ..... *Respondent*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI
FILED AUGUST 29, 1983
CERTIORARI GRANTED DECEMBER 12, 1983

JOINT APPENDIX

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

August 21, 1978 – Petition for writ of habeas corpus filed.

Sept. 11, 1978 – Response to petition for writ of habeas corpus filed.

Aug. 16, 1979 – Petitioner's motion to amend filed.

Aug. 22, 1979 – Respondent enters oral denial of allegations made in amended petition at hearing before United States Magistrate.

Aug. 22, 1979 – Hearing on petitioner's amended petition for writ of habeas corpus.

March 24, 1980 – Recommended disposition by United States Magistrate.

June 24, 1980 – Order of United States District Court remanding cause for further hearing filed.

Oct. 21, 1980 – Supplemental hearing to admit testimony of Lacy Gordon.

Aug. 28, 1981 – Report with recommended findings and conclusions of United States Magistrate.

Sept. 17, 1981 – Order of United States District Court adopting Magistrate's findings and conclusions filed.

Sept. 17, 1981 – Judgment of United States District Court filed.

June 17, 1982 – Stipulation of testimony of Benny Kelley given in open court December 11, 1980.

May 6, 1983 – Opinion of the Court of Appeals for the Eighth Circuit filed.

May 31, 1983 – Petition for Rehearing En Banc filed.

June 30, 1983 – Order of the Court of Appeals for the Eighth Circuit denying Mabry's petition for rehearing en banc filed.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

GEORGE JOHNSON PETITIONER

VS. NO. PB-C-78-139

JAMES MABRY, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION RESPONDENT

****

BEFORE HONORABLE HENRY L. JONES, JR., UNITED STATES MAGISTRATE, IN PINE BLUFF, ARKANSAS, ON AUGUST 22, 1979

****

APPEARANCES:

On Behalf of the Petitioner:

RICHARD QUIGGLE, Esq.
1100 Worthen Bank Building
Little Rock, Arkansas 72201

On Behalf of the Respondent:

DENNIS MOLOCK, Esq.
Office of the Attorney General
Justice Building
State Capitol Grounds
Little Rock, Arkansas 72201

[The following occurred during these proceedings].

(Recess)

• • •

MR. QUIGGLE: Your Honor, during the recess the State and I have agreed that we can stipulate to certain dates that are important in the history of Mr. Johnson's legal activities.

I would like at this time to read the stipulation of the dates and occurrences into the record.

THE COURT: All right.

MR. QUIGGLE: 11-23-1970, Mr. Johnson was found guilty and sentenced to life imprisonment. 6-15-71, he was convicted of assault with intent to kill and burglary. He received a twenty-one and a twelve year sentence, the sentences to run concurrent.

8-7-72, the murder case was reversed. 8-21-72, Jim Howard appeared for arraignment. 10-6-72, Jim Howard relieved, Harold Hall, Public Defender, appointed to represent Mr. Johnson.

10-31-72, a pen order was filed for Johnson for a plea date. 11-8-72, there were two events: a motion to pay Jim.

[T. 33]

MR. QUIGGLE: (Continuing) Howard a fee, and secondly, a jury was impaneled, evidence received on behalf of State, recess at 4:45 p.m.

11-9-72, two events: Court reconvenes, mistrial declared, Howard awarded fees. 11-15-72, trial reset for December 7th and 8, 1972. December 4, 1972, trial continued to February 26, 1972.

February 26, 1973, guilty plea entered. Twenty-one years to run consecutively; that is, to commence at the expiration of sentence now serving.

7-14-1977, Mr. Johnson's Rule 37 hearing was held, and on 6-5-78 the Arkansas Supreme Court affirms the denial of the Rule 37 petition.

THE COURT: Mr. Molock, is that stipulation agreeable?

MR. MOLOCK: Yes, Your Honor, it is.

THE COURT: That will be accepted.

[T. 34]

* * *

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

GEORGE JOHNSON PETITIONER

VS. CASE NO. PB-C-78-139

JAMES MABRY, Director, Arkansas Department of Correction RESPONDENT

JUDGMENT

Pursuant to the Order entered this date, it is Adjudged that the petitioner's petition for a writ of habeas corpus be, and it is hereby, dismissed.

DATED this 16th day of September, 1980.

/s/ William R. Overton
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

GEORGE JOHNSON PETITIONER

VS. CASE NO. PB-C-78-139

JAMES MABRY, Director, Arkansas
Department of Correction RESPONDENT

ORDER

The Court has received a Report with Recommended Findings and Conclusions from Magistrate Henry L. Jones, Jr. After careful review of those Findings and Conclusions, the Court adopts them in their entirety.

THEREFORE, IT IS ORDERED that the petitioner's petition for a writ of Habeas Corpus is dismissed.

IT IS SO ORDERED this 16th day of September, 1980.

/s/ William R. Overton
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

GEORGE JOHNSON PETITIONER

VS. CASE NO. PB-C-78-139

JAMES MABRY, Director, Arkansas
Department of Correction RESPONDENT

REPORT WITH RECOMMENDED FINDINGS AND CONCLUSIONS

The petitioner, an inmate of the Arkansas Department of Correction, was convicted by a jury on November 23, 1970, of murder in the first degree and was sentenced to a term of life imprisonment. On June 15, 1971, he was found guilty of burglary and assault with intent to kill and sentenced to twenty-one years. These charges arose from the same incident for which petitioner received the life sentence. Petitioner's conviction of first degree murder was subsequently reversed by the Arkansas Supreme Court due to the trial court's failure to give a requested jury instruction. *Johnson v. State*, 252 Ark. 1113 (1972). On February 26, 1973, petitioner entered a plea of guilty to the charge of accessory after a felony murder and was sentenced to a term of twenty-one years, to run consecutively to the twenty-one year sentence he was serving for burglary and assault with intent to kill.

Petitioner sought post-conviction relief pursuant to Rule 37 of the Arkansas Rules of Criminal Procedure alleging ineffective assistance of counsel and coerced guilty plea. The Pulaski County Circuit Court denied petitioner's request for post-conviction relief and, in an unpublished opinion, the Arkansas Supreme Court affirmed on June 5, 1978. He then filed a petition for a writ of habeas corpus under 28 U.S.C. §2554.

Petitioner alleges that his confinement is unconstitutional for two reasons:

> (1) His plea of guilty was unlawfully induced and not made voluntarily, since he did not understand the nature and consequence of the plea and accepted the offer of twenty-one years only after being threatened by counsel; and
>
> (2) He was denied effective assistance of counsel in that his appointed counsel only talked with him for ten

> minutes, did not explain the nature and consequences of a plea of guilty, did not interview any witnesses, and did not discuss his version of the facts with him.

The respondent admits that the petitioner has exhausted his state remedies as to these grounds as required by 28 U.S.C. §2254(b).

In that this is a habeas corpus proceedings, the findings of the state trial court are presumptively correct unless (1) the merits of the factual dispute were not resolved in the state court hearing; (2) the fact finding procedure employed by the state court was not adequate to afford a full and fair hearing; (3) the material facts were not adequately developed at the state court hearing; (4) the state court lacked jurisdiction of the subject matter or over the person of the applicant in the state court proceeding; (5) the applicant was an indigent and the state court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the state court proceeding; (6) the applicant did not receive a full, fair, and adequate hearing in the state court proceeding; (7) the applicant was otherwise denied due process of law in the state court proceeding; (8) or unless, on the record as a whole, the federal court concludes that the factual determination by the state court is not fairly supported by the record. 28 U.S.C. §2554(d).

Here the presumption applies because the record reveals that none of the above circumstances exist. In a case where the district court had granted habeas relief, the Eighth Circuit made the following comments:

> **The federal district court in fact relied upon the exact testimony taken in the state proceeding. The federal district judge made no finding that the 1952 state court factual determination was *not* supported by the record. Under these circumstances, "the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the state court was erroneous." *See* §2254(d).**

In Re Parker, 423 F.2d 1021 (8th Cir.); *cert. denied*, 398 U.S. 966 (1970).

The following review of the facts by the Arkansas Supreme Court in its reversal of Johnson's conviction, sets the background for the issues addressed herein.

> Mr. and Mrs. W.A. Siscoe and their daughter Vicki arrived home from the Siscoe grocery store on the night of May 22, 1970, at about 10:45 p.m. Mrs. Siscoe drove her vehicle into the driveway, parked it and awaited her daughter and husband, who followed her in a vehicle driven by the husband. He stopped his car and the daughter got out, opened the front door and entered the Siscoe dwelling. Her father heard her screaming inside the house and ran inside, armed with a .38-caliber revolver, where he became aware of the presence of an intruder who threatened to kill him and began firing a weapon. When Siscoe returned the fire, the intruder grabbed Vicki, swung her around as a body shield and a scuffle ensued during which Siscoe fired, or attempted to fire over the intruder's shoulder. Shots were fired by the father and by at least one intruder. In the exchange of gunfire, Vicki Siscoe was struck by a bullet from her father's weapon and another from a .22-caliber weapon obviously fired by the intruder. The state medical examiner testified that, in his professional opinion, Vicki's death was caused by a large caliber bullet of the same type as a .38-caliber slug exhibited to him. Both appellant, who admitted his presence in the house at the time, and W.A. Siscoe were wounded. All three wounded persons were admitted to Baptist Medical Center, where Vicki Siscoe died.
>
> Fingerprints lifted from the .22-caliber pistol were not Johnson's. There was obvious evidence of a forcible entry into the house by the breaking of a window and the removal of a window screen. The ransacking of dresser drawers and the opening of two piggy banks therein were clear indications of larcenous intent of at least one of the intruders. Fingerprints lifted from the windowsill were not Johnson's. (Footnote omitted)

252 Ark. at 1114, 1115.

An evidentiary hearing was held on August 22, 1979, in Pine Bluff, Arkansas. Petitioner was present and testified, as did three other witnesses. Petitioner was represented by Richard Quiggle, appointed by the Court. The respondent was represented by Assistant Attorney General Dennis Molock.

After an initial report with recommended findings and conclusions was submitted to the Hon. William R. Overton, the case was remanded to this magistrate for the consideration of additional evidence.

The testimony at trial established that shortly after petitioner's conviction of murder was reversed by the Arkansas Supreme Court, the Public Defender's office was appointed to represent him in the person of Harold Hall. Mr. Hall was offered a plea proposal by the prosecutor on October 27, 1972, and he communicated the offer to the petitioner the next day, a Saturday. The prosecutor offered petitioner a twenty-one year sentence, to be served concurrently with the twenty-one year sentence he was serving for burglary and assault, in exchange for petitioner's plea of guilty to the charge of accessory after a felony murder. Petitioner accepted the offer and Mr. Hall called the prosecutor on the following Monday and communicated petitioner's acceptance of the offer. At that time, the prosecutor withdrew his offer saying that a mistake had been made. Mr. Hall then assigned the case to John Achor and told him to tell petitioner that the plea bargain had been withdrawn.

On November 8 and 9, 1972, petitioner appeared in Pulaski County Circuit Court for trial; on November 9, a mistrial was declared and the jury excused. The trial was reset for December 7 and 8 and later continued to February 26, 1973. On February 26, 1973, petitioner entered a plea of guilty to the charge of accessory after a felony murder and was sentenced to twenty-one years to be served after the

expiration of the twenty-one years he was then serving for burglary and assault.

The petitioner launches a two-pronged attack on his guilty plea. He contends that although he knew the original offer had been withdrawn, he did not then and does not now understand the difference between the terms consecutive and concurrent and that when he pled guilty he thought that he would receive a sentence of twenty-one years which would "run with" the sentence he was then serving. In essence, he thought he was getting what had been offered him before. He also contends that he pled guilty because Mr. Achor had threatened him with a life sentence if he went to trial and because several important witnesses were not present for the trial.

As to petitioner's first attack on his plea, it is well settled that a guilty plea will be set aside if the defendant who has agreed to the terms of a plea bargain does not receive the benefit of that bargain. *Blackledge v. Allison*, 431 U.S. 63 (1977); *Coney v. Wyrick*, 532 F.2d 94 (8th Cir. 1976). A defendant's mistaken subjective impressions, however, "gained from conferences with his legal counsel, in the absence of substantial objective proof showing that they were reasonably justified, do not provide sufficient grounds upon which to set aside his guilty plea." *U.S. ex rel Curtis v. Zelker*, 466 F.2d 1092 (2nd Cir. 1972), *cert. denied*, 410 U.S. 945 (1973); see *Griffith v. Wyrick*, 527 F.2d 109 (8th Cir. 1975). "The voluntariness of the plea depends on the subjective mind of the petitioner but the resolution of the factual issue most often must be determined by the objective evidence." *Ford v. U.S.*, 418 F.2d 855 (8th Cir. 1969).

The record in this case supports the conclusion that the petitioner was aware of the sentence he would receive and, thus, his alleged mistaken belief was not reasonably justified. Before petitioner's plea was taken, the circuit court judge made the following statement to the prospective jurors in the petitioner's presence: "He's agreed to take

twenty-one years on top of the twenty-one he's got which will make a total of forty-two years." Bill of Exceptions, p. 3. The judge later remarked, "As I understand it, what he wants to do is plead guilty and take twenty-one years and this twenty-one year sentence is to commence at the expiration of the sentence he's got in the burglary count." Bill of Exceptions, p. 4. It may be true that the petitioner did not and does not now understand the terms concurrent and consecutive, and did not understand the use of the word "expiration" in the court's second statement. This Court must, however, credit the testimony of Mr. Achor [1] given the state court judge's quoted first statement in the presence of the petitioner. The evidence does not, therefore, convincingly show that the petitioner's alleged mistaken belief was reasonably justified.

In petitioner's second attack on his guilty plea, he argues that the plea was the result of unlawful inducement. He asserts that Mr. Achor threatened him with a life sentence if he went to trial and that he could not proceed to trial because several important witnesses were not present and he, therefore, had no choice but to plead guilty.

When a defendant enters a guilty plea, there must be an affirmative showing on the record that the plea was intelligent and voluntary. *Boykin v. Alabama*, 395 U.S. 238 (1969). A guilty plea is an admission and a waiver of the right to a trial before a judge or jury. "Waivers of constitutional rights not only must be voluntary, but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. U.S.*, 397 U.S. 742 (1970). That the guilty plea was motivated by the fear of the possibility of a heavier sentence does not necessarily prove that "the plea was

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[1] Mr. Achor testified that he discussed in detail with petitioner the fact that he was receiving a total of forty-two years and attempted to compare that with the life sentence he believed might result from a trial of the case.

coerced and invalid as an involuntary act." *Brady*, supra, at 750. The Supreme Court in *Brady*, adopted the following standard from *Shelton v. U.S.*, 242 F.2d 101 (5th Cir.), aff'd., 246 F.2d 571 (1957) (en banc), rev'd on confession of error on other grounds, 356 U.S. 26 (1958):

> A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentations (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business.

Brady, supra, at 755.

Mr. Achor testified that as a result of his view of the transcript of the first trial and his investigation, he did communicate to the petitioner that he believed if the case went to trial he would be convicted and receive a life sentence. Whether or not the facts surrounding the "threat" of a life sentence by his counsel or the missing witnesses, as discussed later in relation to the issue of ineffective assistance of counsel, or the fact that the petitioner had shown the willingness to go to trial on three earlier occasions, met the standards required to show a coerced guilty plea, the Court need not decide. The petitioner has placed the Court in an almost impossible situation. Although he has not shown that his alleged mistaken belief that he was to receive a twenty-one year concurrent sentence was reasonable, the Court cannot in the face of that assertion and his testimony rule that he has shown by convincing evidence that his plea was the result of unlawful inducement or coercion. The petitioner and Mr. Achor testified that the twenty-one year concurrent sentence was what the petitioner wanted. The petitioner testified that he thought that was what he received and that he was satisfied until the officials at the prison gave him his time card showing a forty-two year sentence,

subsequent to this arrival there. Yet, the petitioner would have the Court reject that testimony totally and find that his plea was coerced. It is sometimes appropriate and necessary for parties to plead alternative theories for relief. However, when a party presents logically inconsistent factual assertions in support of those legal theories, he requires the court, in order to give relief, to reject a complete and logical set of factual assertions in favor of another complete and logical set. This the Court is unwilling to do. Thus, the petitioner's assertions as to his belief concerning the twenty-one year concurrent sentence preclude the finding urged in his coerced plea argument.

The petitioner alleges that he was denied effective assistance of counsel. The standard in the Eighth Circuit in evaluating a petition alleging ineffective assistance of counsel is well established.

> The standard for determining the adequacy of counsel is whether the trial counsel exercised "the customary skills and diligence that a reasonable competent attorney would perform under similar circumstances." *United States v. Easter*, 539 F.2d 663, 666 (8th Cir. 1976), *cert. denied*, 434 U.S. 844 (1977). There is a presumption that counsel has rendered effective assistance. *Thomas v. Wyrick*, 535 F.2d 407, 413 (8th Cir.), *cert. denied*, 429 U.S. 868 (1976). To overcome the presumption, appellant must show that: (1) there was a failure to perform an essential duty owned (sic) by the defense attorney to his client, and (2) that the failure prejudiced the defense. *McQueen v. Swenson*, 498 F.2d 207, 218 (8th Cir. 1974).

Dupree v. U.S., 606 F.2d 829, 830 (8th Cir. 1979).

The Court is convinced that Mr. Achor failed to perform an essential duty owed to the petitioner.[2] Although

[2]Although the petitioner alleges other facts to support his ineffective assistance of counsel argument, the court considers those allegations to be without merit.

the Court finds that Mr. Achor reviewed the transcript of the previous trial and the subsequent Supreme Court opinion, talked with the petitioner and interviewed the victim's father and the police officer, his failure to attempt to locate and interview Eddie Jackson,[3] Lacey Gordon and Benny Kelly compels this conclusion.

The failure to interview prospective witnesses may be a breach of the duty to act as a reasonably competent attorney. *U.S. v. McMillan*, 606 F.2d 245 (8th Cir. 1979); *Morrow v. Parratt*, 574 F.2d 411 (8th Cir. 1978); *Thomas v. Wyrick*, 535 F.2d 407 (8th Cir.), *cert. denied*, 429 U.S. 868 (1976); *McQueen v. Swenson*, 498 F.2d 207 (8th Cir. 1974). Under the circumstances of this case, petitioner's attorney breached that duty. The petitioner was charged by information with murder in the first degree in that he feloniously caused the death of Vicki Siscoe while perpetrating a burglary. The requested but rejected instruction which resulted in the reversal of petitioner's conviction dealt with the standard under which his responsibility for the acts of his alleged companion, Eddie Jackson, was to be judged. That instruction reads:

> In order that one may be guilty of a homicide, the act must be done by him actually or constructively, and that cannot be unless the crime be committed by his own hands or by the hands of someone acting in concert with him, or in furtherance of a common object or purpose.

Johnson v. State, supra, at 1119.

Although Johnson was identified by the victim's father as the person with whom he exchanged fire, Johnson testified at trial that Eddie Jackson, Lacey Gordon and Benny Kelly accompanied him to the Siscoe's home and that

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[3]Mr. Achor's testimony was that he did not remember interviewing Jackson.

Jackson gained entry through a window and let him in. He stated that "he did not enter the Siscoe house with the intent to commit larceny and did not know that his companion, Jackson, had any intention to do anything there except collect some money due him, until Jackson broke a window to gain entrance." *Johnson v. State*, at 1118. Gordon and Kelly apparently never entered the home. Johnson also testified that Jackson had a gun and he did not.

The testimony of Mr. Earl Evan Harris, III, Chief of Records and Identification for the Arkansas Department of Correction, indicates that Eddie Jackson was an inmate of the Cummins Unit during the period that petitioner's attorney was investigating this case. Although there was no evidence presented as to where Gordon and Kelly were at that time, petitioner's attorney made no attempt to locate and interview them. These potential witnesses were crucial in any attempt to find evidence supporting the petitioner. Thus, the petitioner has established the breach required in the first steps of the Court's analysis.

Two hearings have been held since the remand from Judge Overton. Evidence was presented on the issue of prejudice to the petitioner as a result of the breach of duty found by the court. In supplemental hearings it was established that Eddie Jackson was unavailable for the initial hearing in this court and remains unavailable because of an outstanding warrant for his arrest for parole violation.

Petitioner testified that on the night of the incident which led to his guilty plea, Benny Kelly, driving Eddie Jackson's car, "dropped Lacey Gordon off" before they proceeded to the Siscoe home. The purpose of going to the Siscoe home was to collect money that Mr. Siscoe owed Jackson.

Lacey Gordon testified that he had known Benny Kelly and George Johnson all of his life and he had met Eddie Jackson a couple of times. Lacey Gordon, however,

remembered no involvement with George Johnson, Benny Kelly or Eddie Jackson on the night of the shooting. He did not remember ever riding in a car with all three of them on any occasion. He heard about the indictment "on the street" and was never contacted to testify in George Johnson's trial. The petitioner's attorney offered as evidence notes taken by him of his telephone interview with Gordon before the supplemental hearings. These notes were intended to show that Gordon's testimony differed from the statement given petitioner's attorney. Although the notes present a hearsay problem, if for impeachment purposes petitioner's counsel withdrew from the case and the notes were admitted under the business record exception or if for the same purpose the petitioner's attorney after withdrawing testified concerning his conversation with Gordon, petitioner's cause would not be advanced. Such testimony would not allow a conclusion that it was available at the time of petitioner's state court trial and thus prejudice could not be shown in this manner. The credibility of the witness is simply destroyed and no basis is left for finding that testimony helpful to the petitioner was available. In addition, Benny Kelly also testified that he had no knowledge of the Siscoe incident except from talk "on the street." The petitioner argues, however, that the denials of Kelly, Gordon and without doubt Jackson would have advanced the petitioner's case.

> He could have testified as he did, called these three to deny any involvement, or more likely to take the "Fifth" and his counsel could have argued to the jury that these denials, or non-responses, clearly showed their involvement.
>
> The argument may have been unsuccessful, but there is no requirement that petitioner show the potential success of his defense. He need only show that the evidence might have been helpful. *McQueen, supra.*

Petitioner's Burden of Proof Memorandum, p. 4.

The standard in *McQueen* is that the evidence *would* have proved helpful. This the Court does not find. Although,

> where the defendant enters a guilty plea, the issue of prejudice necessarily centers upon whether the attorney's failure to completely investigate any material facts prejudice the defendant's ability to make an intelligent and voluntary plea of guilty.

Ford v. Parratt, 638 F.2d 1115, 1118 (8th Cir. 1981), this Court does not find that the denial of involvement or knowledge of the incident by Gordon and Kelly would have affected the petitioner's decision to plead guilty.

Thus, petitioner is left with the argument that the unavailability of George (sic) Jackson is a changed circumstance beyond his control which shifts the burden to the state of showing the absence of prejudice. *McQueen v. Swenson*, 498 F.2d 207, 220 (7th Cir. 1974). A literal reading of *McQueen* would require finding that the burden has shifted to the state. Here, however, the *McQueen* holding does not apply. Both counsel assert and the court agrees that it would be unreasonable to assume that Jackson's testimony would differ from that of Gordon and Kelly. Although Jackson's actual testimony is unavailable because of circumstances beyond the control of the petitioner the testimony itself would not aid the petitioner. This may be a unique circumstance where the burden-shifting doctrine of *McQueen*, if applied, would place the petitioner in a better position than if the witness were able to testify in this habeas proceeding. That is a result which this Court does not believe the *McQueen* Court intended.

The petitioner has now [sic] shown, therefore, that he was prejudiced by the failure of his counsel to interview the three witnesses. He has made no showing that the testimony of Jackson, Gordon or Kelly would have supported his position, and for the Court to assume that fact and thus to assume prejudice would be error. See, *U.S. v. Davis*, No. 79-1758 (8th Cir. Feb. 17, 1980).

The petitioner raised an additional constitutional challenge after the initial hearing in this matter. It is undisputed that the prosecutor communicated an offer of a twenty-one year sentence, to run concurrent with the twenty-one year sentence petitioner was serving for burglary and assault in exchange for a plea of guilty to a reduced charge of accessory after a felony murder. It is also undisputed that this offer was communicated to and accepted by the petitioner, and that the offer was subsequently withdrawn by the prosecutor for the apparent reason that a mistake had been made. The petitioner argues that the withdrawal of the offer after acceptance violated his constitutional rights and that he has a constitutional right to the enforcement of that bargain.

The respondent argues that the petitioner has failed to exhaust this ground and thus the Court should not address the issue. Although the petitioner did seek post-conviction relief pursuant to Rule 37 of the Arkansas Rules of Criminal Procedure, he did not raise this issue.

Rule 37.2 (b) states:

> All grounds for relief available to a prisoner under this rule must be raised in his original or amended petition. Any grounds not so raised or any grounds finally adjudicated or intelligently and understandingly waived in the proceedings which resulted in the conviction or sentence or in any other proceedings that the prisoner may have taken to secure relief from his conviction or sentence may not be the basis for a subsequent petition.

The Arkansas Supreme Court has held that a petitioner is not entitled to file a second petition for relief. *Winberry v. Ark.*, 265 Ark. 65 (1974). *See also, Witham v. Mabry*, 596 F.2d 293 (8th Cir. 1979).

There is no indication that the Arkansas Supreme Court would consider a second petition under Rule 37. The petitioner, thus, has exhausted his remedies.

Although the issue of the withdrawn offer was not raised until after the hearing, the facts are not disputed and the Court will address the issue on its merits. Since the Supreme Court decided *Santobello v. New York*, 404 U.S. 257 (1971), fairness in the plea bargaining process has been viewed as having constitutional dimensions. In almost all decisions, however, the right of the defendant to enforce a plea bargain has been limited to situations in which the defendant has entered his plea of guilty. The petitioner here asserts that the withdrawal of the offer after only his acceptance is fundamentally unfair and requires enforcement by the Court of the bargain. [4]

In *Cooper v. United States*, 594 F.2d 12, 18 (4th Cir. 1979), the Court found a right to enforcement of plea bargains before entering a guilty plea " . . . under appropriate circumstances . . . and on the basis alone of expectations reasonably formed in reliance upon the honor of the government in making and abiding by its proposals." The sources of the constitutional rights found by the Fourth Circuit are the rights to fundamental fairness embraced within substantive due process guarantees and the right to effective assistance of counsel.

In explaining the application of the right to effective assistance of counsel in the context of a withdrawn offer by government, the court stated:

> To the extent that the government attempts through defendant's counsel to change or retract positions earlier communicated, a defendant's confidence in his counsel's capability and professional responsibility, as well as in the government's reliability are necessarily jeopardized and the effectiveness of counsel's assistance easily compromised. At the very least, these Sixth

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[4]The petitioner also asserts that the failure of his counsel to attempt to enforce the plea bargain in Court deprived him of effective assistance of counsel. The Court finds this assertion to be without merit.

> Amendment considerations add a heightened degree of obligation to the government's fundamental duty to negotiate with scrupulous fairness in seeking guilty pleas. Footnote omitted.

Cooper at 18, 19.

The elements crucial to the Cooper court's holding were the specific and unambiguous form of the government's proposal; the reasonable context of the proposal in specific context; the apparent or actual authority of the prosecutor at the time; the prompt communication to the defendant; the prompt and unequivocal assent by the defendant; the prompt communication of acceptance to the government; and the lack of extenuating circumstances affecting the government's or any public interest unknown when the proposal was extended.

In *Virgin Islands v. Scotland*, No. 79-1188 (3rd Cir. Feb. 1980), the Third Circuit declined to follow the *Cooper* rationale. Although it found that Cooper was so factually similar to *Scotland* that alleged distinctions were spurious, the Third Circuit rejected both the Sixth Amendment and due process findings of the Fourth Circuit. As to effective assistance of counsel, the Third Circuit after noting the court in *Cooper* observed that the prosecutor made the offer without any attached condition, reasoned:

> It is reasonable to extrapolate that defense counsel could have a duty to inform his client that an offer proposal is conditional if the prosecutor had so informed him. Thus, according to the *Cooper* rationale, defendant's knowledge of such a contingency would remedy the ineffective assistance of counsel claim. As a practical matter it may be presumed that the government in the Fourth Circuit will make only conditional offers to defendants. If this type of "conditional" offer was not alone sufficient under the *Cooper* holding, the next logical step would be for a court to inquire as to whether the condition that the prosecutor cites is a legitimate

> one or one simply to avoid the holding of *Cooper*. Given the established breadth of prosecutorial discretion at all stages of the criminal process, particularly in charging and plea negotiation, see *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), this type of inquiry would appear to be an invasion of that discretion. Although *Cooper* does not go that far, it does invade the province of the United States Attorney and there is potential for further questionable concrete invasions.

Scotland, supra, slip op. at 6, note 6.

In addressing the due process issue, the Third Circuit found:

> Although the contentions concerning prosecutorial discretion and the discouragement of pleas are persuasive, the availability of an alternative remedy for the defendant is the convincing factor for rejecting the *Cooper* rule.
>
> If the defendant is not allowed to compel specific performance of a plea proposal, he may withdraw his tendered plea or refuse to consent to any new bargain proposed by the prosecutor. It may be argued that this "remedy" is insufficient, particularly in cases where, as here, the government's acts were far from exemplary. However, the defendant is then entitled to his constitutional right to trial by jury. This fundamental right would be belittled if we held it to be an insufficient "remedy" or result for a defendant who has not been induced to rely on the plea to his detriment. The prosecutor is under no duty to plea bargain—if no offer is made, the defendant is entitled to a trial. There is no rational basis for holding, in essence, that a trial is sufficient for the defendant who has not been offered a plea and insufficient for the one who has. The courts cannot compel the prosecutor to offer a plea bargain to eliminate the resulting discrimination between these two types of defendants. There is no rule that dictates that the prosecutor may not simply let a case go to trial.

> In the case sub judice, Springette is in the same position as if he had not been offered a plea because no detrimental reliance is alleged. Thus we reject a *Cooper*-type rule that would allow specific performance of an unconsummated plea in the absence of such detrimental reliance because a jury trial on the charge is an adequate remedy.
>
> When, however, the defendant detrimentally relies on the government's promise, the resulting harm from this induced reliance implicates due process guarantees. This basic estoppel principle was recognized by the Court in *Santobello*, when a defendant pleads guilty in reliance on an agreement with the prosecutor, that promise must be fulfilled. *Santobello* arguably could be extended to cover the situation where the defendant has not yet entered the plea but has relied on the bargain in such a way that a fair trial would no longer be possible. There is no claim in this case of such reliance. Absent such reliance, we do not find the *Cooper* rule compelling. (Footnote omitted)

Scotland, supra, slip op. at 9.

The case sub judice is also factually similar to *Cooper* and the rationale used by the Fourth Circuit would apply. This Court, however, agrees with the compelling reasoning of the Third Circuit in *Scotland*.

THREFORE, IT IS ORDERED that this petition be, and it is hereby dismissed with prejudice.

IT IS SO ORDERED this 27th day of August.

/s/ Henry L. Jones, Jr.
United States Magistrate

United States Court of Appeals
For the Eighth Circuit
May 9, 1983
Attorney General
of
Arkansas

No. 81-2181

George Johnson, *
*
Appellant, *
* Appeal from the United
v. * States District Court
* for the Eastern District
James Mabry, Commissioner, * of Arkansas
Arkansas Department of Correction, *
*
Appellee. *

Submitted: October 15, 1982
Filed: May 6, 1983

Before LAY, Chief Judge, McMILLIAN AND JOHN R. GIBSON, Circuit Judges.

McMILLIAN, Circuit Judge.

George Johnson appeals from a final order entered in the District Court for the Eastern District of Arkansas dismissing his petition for writ of habeas corpus, 28 U.S.C. §2254. For reversal petitioner argues that the district court erroneously refused (1) to grant specific performance of a

proposed plea bargain and (2) to shift the burden of proof to the state to show that petitioner's ineffective assistance of counsel was not prejudicial. For the reasons discussed below, we reverse and remand.

Petitioner's case, like those of many other state habeas petitioners, has become procedurally complicated. For a statement of the facts underlying petitioner's criminal convictions, see *Johnson v. State*, 252 Ark. 1113, 482 S.W.2d 600 (1972). According to the evidence presented by the state, in May 1970 petitioner and Eddie Jackson broke into the house of W.A. Siscoe with the intent to commit burglary. Mr. and Mrs. Siscoe and their daughter Vicki arrived home in the middle of the burglary. Vicki was the first person to enter the house; she confronted the intruders and screamed. Mr. Siscoe heard Vicki's screams and entered the house. One of the intruders threatened to kill him and grabbed Vicki and used her to shield his escape from the house. At this point shots were exchanged by one of the intruders and Mr. Siscoe. Vicki was fatally wounded, and petitioner and Mr. Siscoe were wounded.

Petitioner was convicted of first degree murder for the death of Vicki Siscoe and sentenced to life imprisonment. Petitioner was subsequently convicted of burglary and assault with intent to kill on June 15, 1971; these charges arose out of the same incident. Petitioner was sentenced to 21 years imprisonment for the burglary and 12 years for the assault, to be served concurrently. On July 17, 1972, petitioner's murder conviction was reversed by the Arkansas Supreme Court for failure to give a requested jury instruction and remanded for a new trial. *Johnson v. State*, 482 S.W.2d at 606.

The state trial court appointed Harold Hall of the public defender's offfice to represent petitioner. The following facts about the plea bargaining negotiations are not disputed. On Friday, October 27, 1972, the prosecuting attorney contacted Hall and proposed a 21-year sentence, to

be served *concurrently* with petitioner's burglary and assault sentences, in exchange for a guilty plea to the charge of accessory after a felony murder. Hall told petitioner the terms the next day, Saturday, October 28, 1972. Petitioner agreed to accept the plea proposal. The following Monday, October 30, 1972, Hall called the prosecuting attorney and accepted the plea bargain. However, the prosecuting attorney told Hall that a mistake had been made and withdrew the proposal. The prosecuting attorney then proposed a recommendation of a 21-year sentence to be served *consecutively* to petitioner's other sentences. Apparently Hall did not respond to this second proposal and assigned the case to another public defender, John Achor.

Petitioner proceeded to trial November 8, 1972. On November 9, 1972, the trial court declared a mistrial, evidently on the ground of prejudicial newspaper publicity, excused the jury and rescheduled the trial for December 7, 1972. The trial was later continued to February 26, 1973, when petitioner entered a guilty plea to the charge of accessory after a felony murder and was sentenced to 21 years imprisonment, to be served *consecutively* to the burglary and assault sentences.

Petitioner sought post-conviction relief in the state courts on the grounds of mistake and ineffective assistance of counsel. The state trial court denied relief and its decision was affirmed by the Arkansas Supreme Court in an unpublished opinion, *Johnson v. State*, No. CR-78-18 (Ark. June 5, 1978). Petitioner then filed the petition for writ of habeas corpus, alleging mistake, coercion and ineffective assistance of counsel. Petitioner argued that he did not understand the nature and consequences of the plea bargain and pled guilty only because his defense attorney threatened him with life imprisonment if he went to trial. Petitioner also argued that he received ineffective assistance of counsel because his defense attorney did not discuss the case with him until ten minutes before trial, failed to inter-

view witnesses and did not explain the nature and consequences of the plea bargain.

The district court referred the petition to a magistrate for an evidentiary hearing and report and recommendation. Petitioner, Hall and Achor testified at the first evidentiary hearing in August 1979. At this point petitioner raised an additional constitutional issue, alleging that the prosecuting attorney's withdrawal of the plea bargain proposal after petitioner's acceptance was unconstitutional. The magistrate held supplemental evidentiary hearings in October and December 1980, at which petitioner, Lacey Gordon [1] and Benny Kelley [2] testified.

The district court adopted the magistrate's report and recommendation, *Johnson v. Mabry*, No. PB-C-78-139 (E.D. Ark. Sept. 17, 1981), finding that petitioner's mistaken belief about the sentence he would receive if he pled guilty was not reasonably justified, [3] that petitioner's guilty plea was not induced by threats or misrepresentations by

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[1]Lacey Gordon is a friend of petitioner's and one of three persons petitioner claims were with him on the night of the burglary and shooting.

[2]Benny Kelley is a friend of petitioner's and one of three persons petitioner claims were with him on the night of the burglary and shooting.

[3]*See Griffith v. Wyrick*, 527 F.2d 109, 113 (8th Cir. 1975); *United States ex rel. Curtis v. Zelker*, 466 F.2d 1092, 1098 (2d Cir. 1972), *cert. denied*, 410 U.S. 945 (1973). Here, the record contains statements made by the state trial judge before acceptance of the guilty plea that petitioner "agreed to take twenty-one years on top of the twenty-one he's got [for the burglary and assault] which will make a total of forty-two years." The court also credited the testimony of Achor, who testified that he discussed the nature and consequences of the plea bargain with petitioner, specifically explained to petitioner that the proposed plea bargain sentence represented a total sentence of 42 years and even attempted to compare the possibility of parole for a 42 year sentence with that of a life sentence.

defense counsel, [4] and that petitioner was not prejudiced by ineffective assistance of counsel. [5] The court also rejected

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[4]The court concluded that petitioner's allegation of a mistaken belief that the sentence of the guilty plea (that petitioner voluntarily pled guilty but thought the sentence was for 21 years concurrent) was logically inconsistent with his allegation of coercion (that defense counsel threatened that petitioner would be convicted and sentenced to life if he went to trial). Slip op. at 6. We also note that defense attorney Achor testified that after reviewing the transcript of petitioner's first trial and the opinion of the Arkansas Supreme Court and interviewing Siscoe and several of the police witnesses, he believed that if petitioner went to trial, he would be convicted and would probably receive a life sentence and that he told this to petitioner.

[5]The court found that petitioner's defense attorney failed to attempt to locate and interview Eddie Jackson, Lacey Gordon and Benny Kelley. *E.g., Ford v. Parratt*, 638 F.2d 1115, 1117 (8th Cir.) (failure to investigate rumor), *vacated on other grounds*, 454 U.S. 934 (1981); *Morrow v. Parratt*, 574 F.2d 411, 413 (8th Cir. 1978) (failure to interview witnesses). Although Achor testified that petitioner never mentioned Gordon or Kelley, the court noted that petitioner testified at the first trial that he had been riding around in a car with Jackson, Gordon and Kelley that night and that Gordon and Kelley had dropped Jackson and petitioner off in front of the Siscoe house. Both Gordon and Kelley testified at the supplemental evidentiary hearings that they knew petitioner, were not involved with petitioner or Jackson on the night of the shooting and only heard about the incident "on the street." The record also indicates that Jackson, the individual who broke into the Siscoe house that night and who, according to petitioner, fired the gun, was in the state penitentiary at the time of petitioner's retrial and guilty plea. It appears, however, that Jackson was released on parole in 1977 and is currently wanted by state authorities for violating the conditions of his parole. Jackson has been unavailable as a witness.

The court concluded that defense counsel's failure to attempt to locate and to interview Gordon and Kelley did not prejudice petitioner's ability to make an intelligent and voluntary plea. Slip op. at 9; *see Ford v. Parratt*, 638 F.2d at 1118; *United States v. Davis*, 616 F.2d 365, 366 (8th Cir. 1980) (per curiam); *Nevels v. Parratt*, 596 F.2d 344, 346 (8th Cir.), *cert. denied*, 444 U.S. 859 (1979). Although the court agreed that the unavailability of Jackson was a changed circumstance beyond petitioner's control, the court refused to shift the burden of proof to the state to show the absence of prejudice in defense counsel's failure to attempt to locate and interview Jackson. Slip op. at 9, *citing McQueen v. Swenson*, 498 F.2d 207, 220 (1974). The court concluded that it was unreasonable to assume that Jackson's testimony would have differed from that of Gordon or Kelley, have been helpful to petitioner, or have influenced his decision to plead guilty.

petitioner's claim that the prosecuting attorney's withdrawal of the plea bargain proposal was unconstitutional.[6] Slip op. at 11-12, *citing Government of Virgin Islands v. Scotland*, 614 F.2d 360, 363-65 (3d Cir. 1980) (*Scotland*). The district court dismissed the petition and this appeal followed. On appeal petitioner argues that (1) he has a constitutional right to enforcement of the plea bargain proposal and (2) because of the changed circumstances beyond petitioner's control, the court should have shifted the burden of proof to the state on the question of the absence of prejudice. Because we agree with petitioner's first argument, we do not reach the burden of proof question. *See* note 5 *supra*.

In 1971 the Supreme Court recognized that the "disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice," which, if "[p]roperly administered, . . . is to be encouraged." *Santobello v. New York*, 404 U.S. 257, 260 (1971); *see also Brady v. United States*, 397 U.S. 742, 751-52 (1970) (discussing advantages of plea bargained dispositions for criminal justice administration). The Court's approval of plea bargaining "presuppose[d] fairness in securing agreement between an accused and a prosecutor." *Santobello v. New York*, 404 U.S. at 261. The Court held that "[t]his phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances." *Id.* at 262. The source of the fairness requirement is constitutional, presumably substantive due process, *see Cooper v. United States*, 594 F.2d 12, 15-16 (4th Cir. 1979) (*Cooper*); *see also Santobello v. New*

[6] As noted by the court below, petitioner did not raise this issue in the post-conviction proceedings in Arkansas state courts. However, the Arkansas courts will not entertain successive petitions for relief, at least not in noncapital cases. Therefore, the court concluded that petitioner had exhausted his available state remedies. Slip op. at 10. We agree.

York, 404 U.S. at 266-67 (Douglas J., concurring) (specifically noting that *Santobello* is a state case over which the Supreme Court has no supervisory jurisdiction and recognizing a constitutional basis for the holding); Westin & Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 Calif. L. Rev. 471, 474-75 n.10, 476 n.16 (1978) (hereinafter *Broken Plea Bargains*);Comment, *Specific Enforcement to Ensure Due Process in Plea Bargaining*, 21 Wm. & Mary L. Rev. 521 (1979), and mandates that "the most meticulous standards of both promise and performance must be met by prosecutors engaging in plea bargaining." *Correale v. United States*, 479 F.2d 944, 947 (1st Cir. 1973); *see United States v. Bowler*, 585 F.2d 851, 854 (7th Cir. 1978) ("to protect the plea bargaining defendant from overreaching by the prosecutor and to insure the integrity of the plea bargaining process"); *Palermo v. Warden*, 545 F.2d 286, 296 (2d Cir.), *cert. denied*, 431 U.S. 911 (1976); *Geisser v. United States*, 513 F.2d 862, 863 (5th Cir. 1973); *cert. denied*, 450 U.S. 1031 (1981) (following several remands).

In general the legal analysis in plea bargaining cases has relied heavily upon contract law principles, in particular emphasizing contract formation (offer and acceptance), breach, estoppel (entry of guilty plea or detrimental reliance), and remedies (rescission or specific performance). *See, e.g., Scotland*, 614 F.2d at 364; [7] *Cooper*, 594 F.2d at 16 (citing cases from Fourth Circuit); *People v. Calloway*, 29 Cal. 3d 666, 631 P.2d 30, 175 Cal. Rptr. 596 (1981) (bank); *People v. Kaanehe*, 19 Cal. 3d 1, 559 P.2d 1028, 136 Cal. Rptr. 409 (1977); *Shields v. State*, 374 A.2d 816, 819 (Del.), *cert. denied*, 434 U.S. 893 (1977); *see generally Broken Plea Bargains*, 66 Calif. L.Rev. at 525. Other cases, however,

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[7] "The bargaining process has often been analogized to contract principles, and plea agreements are often likened to unilateral contracts – consideration is not given for the prosecutor's promise until the defendant actually enters his [or her] plea of guilty." *Government of Virgin Islands v. Scotland*, 614 F.2d 360, 364 (3d Cir. 1980) (*Scotland*) (footnote omitted).

have recognized that contract law is useful only as an analogy. *See United States v. Calabrese*, 645 F.2d 1379, 1390 (10th Cir.) (analogy to contract law is not determinative in plea negotiations), *cert. denied*, 451 U.S. 1018 (1981); *Cooper*, 594 F.2d at 16-20; *United States ex rel. Selikoff v. Commissioner of Correction*, 524 F.2d 650, 654 (2d Cir. 1975), *cert. denied*, 425 U.S. 951 (1976); *cf. Brewer v. Williams*, 430 U.S. 387, 401 n.8 (1977) ("We do not deal here with notions of offer, acceptance, consideration, or other concepts of the law of contracts. We deal with constitutional law."); *Roe v. United States Attorney*, 618 F.2d 980, 981 (2d Cir.) (per curiam) (court of appeals will not use doctrine of actual authority in context of promises made by government officials), *cert. denied*, 449 U.S. 856 (1981); *United States v. Bowler*, 585 F.2d at 854 ("A plea agreement is not an appropriate context for the Government to resort to a rigidly literal approach in the construction of language.") *See generally Broken Plea Bargains*, 66 Calif. L. Rev. at 527-28 (proposing theory of "constitutional contracts").

The analogy between contracts and plea agreements works well in the usual plea bargain case, which involves the entry of a guilty plea, or the performance of some other action, following plea negotiations and an agreement about specific terms. *E.g., United States v. Runck*, 601 F.2d 968, 970 (8th Cir. 1979) (on petition for rehearing) (following entry of negotiated plea, dispute arose over whether part of sentence was within plea agreement accepted by district court). Traditional contract principles, however, are of little guidance in a plea proposal case like the present one. Here, as in *Cooper* and *Scotland*, we are confronted with a fact situation that falls short of a plea bargain. [8] Petitioner did not enter a plea of guilty in court and has not performed any

[8] Here, the prosecuting attorney proposed the 21-year concurrent sentence on Friday; the defense attorney discussed the plea proposal with petitioner on Saturday and petitioner agreed to accept the plea proposal that day. The defense attorney contacted the prosecuting attorney on Monday and accepted the plea proposal, but the prosecuting attorney

then withdrew the plea proposal, explaining only that a mistake had been made. In *Cooper* the relevant events occurred on the same day: about 11 a.m. the prosecuting attorney and defense attorney discussed the terms of the plea proposal; the defense attorney immediately discussed the plea proposal with the defendant, who agreed to accept; about 12 p.m. the defense attorney attempted to contact the prosecuting attorney; about 1:30 p.m. the prosecuting attorney's superior reviewed the plea proposal and instructed the prosecuting attorney to withdraw the plea proposal before the defense attorney accepted. 594 F.2d at 15. In *Scotland* the time interval is greater, but the facts are essentially the same. 614 F.2d at 363. On November 11 the prosecuting attorney made its plea proposal; the terms were communicated to the defendant on November 29 and defendant agreed to accept them at that time; the prosecuting attorney, however, added a new condition to the plea proposal; the defendant moved for specific performance of the initial plea proposal. *Id.* at 361-62.

Present in each case are the following factors that the *Cooper* court considered crucial to the finding of a constitutional right and violation:

> [1] the proposal was specific and unambiguous in form, and [2] was made without any reservation related to a superior's approval or otherwise; [3] its content was reasonable in context; [4] it was made by a prosecutor with apparent (and probably actual) authority at the time; [5] it was communicated promptly to the defendant so that no question of staleness was involved; [6] the defendant assented promptly and unequivocally to its terms, indicated . . . assent to [defense] counsel, and was entitled so far as the record shows to assume that its communication to the government would consummate the plea agreement; [7] defense counsel did in fact within a matter of a few hours [or within several days] communicate defendant's acceptance to the government, by sheer fortuity being told of the government's "withdrawal" before [defense counsel] could vocalize [defendant's] "acceptance"; and finally, [8] the reason for the attempted withdrawal had nothing to do with extenuating circumstances affecting the government's or any public interest that were unknown when the proposal was extended, but [apparently] lay simply in a superior's second-guessing of a subordinate's judgment.

594 F.2d at 19. *Cf. People v. Calloway*, 29 Cal.3d 666, 631 P.2d 30, 175 Cal. Rptr. 596, 603 n.3 (1981) (bank) (Bird, C.J., dissenting) (factors which favor the prosecution's choice of remedy for broken plea bargains: fraud by the defendant, additional information developed later and changed circumstances); *People v. Johnson*, 10 Cal. 3d 895, 519 P.2d 604, 112 Cal. Rptr. 556 (1974) (bank) (defendant concealed true name and past criminal record).

specific action in reliance upon the plea bargain. *Compare Palermo v. Warden*, 545 F.2d at 290 (defendants offered reduced sentences and early parole in exchange for return of stolen jewelry); *See United States v. Bowler*, 585 F.2d at 852 (plea agreement provided for dismissal of counts and recommended sentence if defendant cooperated in further prosecutions and other investigations). However, petitioner did rely on the plea proposal to the extent that he considered the terms offered, agreed to accept the plea proposal and communicated his willingness to plead guilty to the prosecuting attorney.

In *Cooper* the Fourth Circuit found "the constitutional right to 'fairness' [set forth in *Santobello*] to be wider in scope than that defined by the law of contract" and recognized "a constitutional right to enforcement of plea proposals [which] may arise before any technical 'contract' has been formed, and on the basis alone of expectations reasonably formed in reliance upon the honor of the government in making and abiding by its proposals." 594 F.2d at 16-18 (footnotes omitted). The *Cooper* court based this constitutional right on substantive due process: it is simply unfair to permit the government in effect to go back on its word. *Id.* at 18-19; *cf. Broken Plea Bargains*, 66 Calif. L. Rev. at 513 (arguing that *Santobello* can be understood as extending constitutional protection to the personal expectations created in defendants by plea agreements with the state). The *Cooper* court also relied upon the sixth amendment right to effective assistance of counsel:

> Because prosecutors are required to conduct plea negotiations through defense counsel, the government's positions and communications in plea discussions are necessarily mediated through his [or her] counsel . . . . To the extent that the government attempts through defendant's counsel to change or retract positions earlier communicated, a defendant's confidence in his [or her] counsel's capability and professional responsibility, as well as the government's reliability, are

> necessarily jeopardized and the effectiveness of counsel's assistance easily compromised.

594 F.2d at 18-19 (footnote omitted). The holding in *Cooper* was very narrow:

> When . . . a proposal—specific, unambiguous and not unreasonable on its face—is offered by the government to a defendant through his [or her] counsel, constitutional fairness requires that it be fulfilled if within a reasonable time the defendant unequivocally [agrees to accept] it, and unless in the interval extenuating circumstances affecting the propriety of the proposal that were unknown to and not reasonably discoverable by the government when the proposal was made have supervened or become known.

Id. at 19; *see* note 8 *supra* (listing specific factual considerations relied upon by court). *Cf.* Comment, 21 Wm. & Mary L. Rev. at 536-39 (arguing procedural due process as preferable constitutional basis for *Cooper* holding).

The Third Circuit in *Scotland* rejected the Fourth Circuit's due process analysis on the grounds that it not only interfered with prosecutorial discretion [9] and discouraged pleas, [10] but, more importantly, was unnecessary

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9 "[B]inding the prosecutor to his [or her] original plea [proposal] does interfere with his [or her] discretionary functions, i.e., determining what he [or she] feels is fairest in light of the defendant's circumstances, the government's resources, and the statute involved." *Scotland*, 614 F.2d at 364 (footnote omitted).

10 [Prosecutors] will be reluctant to offer to bargain until they are very sure that they want to be bound by the offer. The fact that the government would have to be very careful about all the elements of the offer certainly is not detrimental. However, if the result of the [*Cooper*] rule is either a delay in bargaining or fewer plea proposals, there is also a consequent diminished savings of prosecutorial and judicial resources. Moreover, the advantages of quick disposition and quick punishment are also diminished.

Id.

because, in the absence of detrimental reliance, a jury trial is an adequate remedy. [11] 614 F.2d at 364-65. The Third Circuit also found no implication of the sixth amendment right to effective assistance of counsel in the government's withdrawal of the plea proposal. [12]

We believe that the *Cooper* analysis should be followed. This approach recognizes the limited usefulness of contract principles in the plea bargaining context. Plea bargaining involves more than commercial law. Because the entry of guilty plea constitutes a waiver of fundamental constitutional rights, *Santobello v. New York*, 404 U.S. at 264 (Douglas, J., concurring), plea bargains are not just contracts in which the prosecution exchanges the dismissal or reduction of charges and recommendations on sentencing for the defendant's guilty plea. Imposing upon the government the duty to conduct plea bargaining with scrupulous

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[11] [The fundamental right to a trial by jury] would be belittled if we held it to be an insufficient "remedy" or result for a defendant who has not been induced to rely on the plea to his detriment. The prosecutor is under no duty to plea bargain – if no offer is made, the defendant is entitled to a trial. There is no rational basis for holding, in essence, that a trial is sufficient for the defendant who has not been offered a plea and insufficient for the one who has.

Id. at 365.

[12] We note that in [all] plea negotiations, even when they do not involve the withdrawal of a plea proposal, there is a possibility that the defendant may lose faith in his [or her] attorney when, for example, the government fails to offer any plea proposal or offers only an unfavorable one. This factor, without more, is not enough to violate the defendant's sixth amendment right. The appropriate focus for determining whether the right to effective counsel has been violated is on defense counsel and his [or her] performance rather than on defendant's perception of defense counsel.

Id. at 363 (footnote omitted). Of course, the court in *Cooper* relied upon the sixth amendment right to effective assistance of counsel as another source of "the government's fundamental duty to negotiate with scrupulous fairness in seeking guilty pleas." 594 F.2d at 19.

fairness, which, in the present case, would require the government to honor the terms of its plea proposal, is consistent with the "fairness" requirement set forth in *Santobello*. As noted in *Cooper*, "constitutional decisions cannot be made to turn in favor of the government on the fortuities of communications or on a refusal to accord any substantive value to reasonably induced expectations that government will honor its firmly advanced proposals." 594 F.2d at 17.

We do not agree that the *Cooper* analysis improperly restricts prosecutorial discretion. The government does not have to initiate or participate in plea bargaining. *See Weatherford v. Bursey*, 429 U.S. 545, 561 (1977). However, once the government does so, it must negotiate with "scrupulous fairness." *Cooper* does not restrict the particular terms that the government may propose during plea negotiations; the government may make conditional proposals and may withdraw or modify outstanding proposals that have not been accepted or rejected after a reasonable period of time. *Cooper* does, however, require the government to honor whatever terms it has proposed if they are promptly and unequivocally agreed to by the defendant. In practice, this means that government attorneys may have to become better organized and scrutinize plea proposals before discussing them with defense counsel. *See*, 594 F.2d at 20. Further, requiring the government to conduct plea negotiations in a more orderly manner should not necessarily discourage guilty pleas. A more orderly method should reduce arbitrary action and promote greater consistency in the disposition of similar cases, thus encouraging defendants to enter pleas. *See* Comment, 21 Wm. & Mary L. Rev. at 536-38. Moreover, *Cooper* expressly contemplates that the government can withdraw a plea proposal or reopen plea negotiations, even after the plea proposal has been accepted by the defendant, if the government demonstrates that the plea proposal was based upon inaccurate or incomplete information, for example, if the defendant misrepresents or conceals relevant information or there is additional information that was not reasonably discoverable at the time the plea proposal was offered. 594 F.2d at 19.

Nor can we agree that a jury trial is an adequate remedy in cases like the present one. In terms of the contract law analogy, trial does not provide the defendant with the benefit of the bargain, that is, jury trial will not protect the defendant's reasonable expectations that the government will honor its proposals. Nor does the alternative of jury trial really address the conduct of the government. We are concerned here with what the Fourth Circuit in *United States v. Carter*, 454 F.2d 426, 428 (4th Cir. 1972) (banc), *cert. denied*, 417 U.S. 933 (1974) (following remand), characterized as "the honor of the government" and "public confidence in the fair administration of justice." Here, the government in effect promised to recommend a specific sentence if petitioner agreed to plead guilty to a specific charge. If we were to hold that jury trial is an adequate remedy in these circumstances, we would have no effective way to discourage the potential abuse of the plea bargaining process. We will not allow the government to take advantage of petitioner's acceptance of the plea proposal, in the absence of any change in the underlying circumstances, and to exploit petitioner's decision to plead guilty by further hard bargaining and by recommending a longer sentence. *Compare Bordenkircher v. Hayes*, 434 U.S. 357, 360-65 (1978) (no violation of due process by prosecutor who carries out threat made during plea negotiations to have accused reindicted on more serious charges on which he is plainly subject to prosecution if he does not plead guilty to offense with which he was originally charged).

In sum, we stress that our holding, like that in *Cooper*, is very narrow and dependent upon the specific facts. *See* note 8 *supra*. The appropriate remedy is a difficult problem in plea bargain cases. *E.g., Santobello v. New York*, 404 U.S. at 263 (specific performance or withdrawal of plea); *Id.* at 266-67 (Douglas, J., concurring); *Correale v. United States*, 479 F.2d at 949-50; *see also Broken Plea Bargains*, 66 Calif. L. Rev. at 474-76. Here, petitioner seeks enforcement of the plea proposal. Accordingly, we reverse the dismissal of the petition for habeas corpus and remand the case to the

district court with directions to grant the writ of habeas corpus unless the state resentences petitioner in accordance with the concurrent sentence plea proposal within 120 days of the filing of this opinion.

JOHN R. GIBSON, Circuit Judge, dissenting.

I respectfully dissent. I believe the better view is that detrimental reliance is necessary to enforce an offer for a plea bargain. *Government of Virgin Islands v. Scotland*, 614 F.2d 360 (3d Cir. 1980). My view and that in *Scotland* is not based upon contract principles. As stated in *Scotland*, detrimental reliance implicates due process guarantees. 614 F.2d at 365. The court in *Scotland*, discussed *Santobello v. New York*, 404 U.S. 254 (1971), and reasoned that *Santobello* recognized a basic estoppel principle. In *Santobello* the guilty plea had been entered on June 16, 1969, in reliance on an offer that the prosecuting attorney would not recommend a sentence. It was only when the defendant appeared before a different judge for sentencing on January 9, 1970, that he learned that the agreement had been broken. *Santobello* thus dealt with a situation in which there had been detrimental reliance.

I believe that the majority has adopted a chameleon approach to reliance. The majority first states that petitioner "has not performed any specific action in reliance upon the plea bargain." Slip op. at 09-10. It continues "[h]owever, petitioner did rely on the plea proposal to the extent that he considered the terms offered, agreed to accept the plea proposal and communicated his willingness to plead guilty to the prosecuting attorney." Slip op. at 10.

It is abundantly clear that the majority has found no detrimental reliance in this case, and its holding requires no detrimental reliance. The majority specifically adopts the reasoning in *Cooper v. United States*, 594 F.2d 12 (4th Cir. 1979), as opposed to the approach in *Scotland*. *Scotland* requires a showing of detrimental reliance to enforce a plea of-

fer, but *Cooper* makes no such requirement. Accordingly, the extended discussion adopting *Cooper* is unnecessary unless the majority really is finding that there was no detrimental reliance in this case. If there was detrimental reliance, both *Scotland* and *Cooper* would support enforcement of the plea offer.

The magistrate in his report and the district court in its order adopting the report concluded that no detrimental reliance was present. Immediately after a lengthy quotation from *Scotland* underscoring the distinction that *Cooper* would allow specific performance of a plea offer where there was no detrimental reliance, the magistrate stated that the case was factually similar to *Cooper*. The petition for habeas corpus as originally filed makes no reference to detrimental reliance, nor does the motion to amend filed by petitioner's counsel. Petitioner's counsel, in his objections to the proposed findings and conclusions details a finding of detrimental reliance based upon counsel's lack of preparedness to go to trial November 8, 1972. This argument does not bear upon the issue before us, however, as the November 8 trial resulted in a mistrial and petitioner's guilty plea was not entered until February 26, 1973.

Cooper enumerated several limitations on its holding. Among the qualifications stated in *Cooper* is that the plea offer be reasonable in context. Johnson had originally been convicted of first degree murder and sentenced to life imprisonment. The conviction on this charge was set aside and the guilty plea now before us was later entered to the lesser charge of "accessory after a felony murder." Johnson's conviction of burglary carried a twenty-one year sentence and his assault with intent to kill conviction carried a twelve year concurrent sentence. I question whether we can conclude it is reasonable for the prosecutor to offer a concurrent twenty-one year sentence on the murder charge, or accessory after a felony murder charge, which would result in defendant's receiving the same sentence for murder, burglary and assault that he had received for burglary and

assault alone. There is no explanation in the record as to the nature of the mistake that was the reason for the withdrawal of the plea offer. We can only speculate that the prosecutor may have intended to offer a consecutive twenty-one year sentence but mistakenly said "concurrent". That there was a mistake in making the offer in this case, however, is further distinction from the limited circumstances in *Cooper*, which involved the overruling of a subordinate by a superior in the United States Attorney's office.

Cooper stressed the significance of this distinguishing circumstance in the following statement:

> This necessarily means that once presented, such a proposal may not be withdrawn in the face of proffered acceptance for no other reason than that a superior disagrees with an apparently authorized subordinate's judgment in making it.

Cooper v. United States, 594 F.2d at 19.

While *Cooper* is careful to make plain the factual limitations on the scope of its holding and the majority here seems to do so, the net result in this case is simply to expand the *Cooper* rule to an unacceptable extreme.

The majority also holds that a jury trial is an inadequate remedy where a plea bargain offer is withdrawn. [1] I find more persuasive the reasoning in *Scotland* that the great constitutional right to trial by jury is an adequate remedy. While it is true, as the majority states, that a jury trial will not give the defendant the benefit of his bargain with the government, he is not entitled to any particular sentence within the range provided in the statute for the crime with which he is charged. When the government

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[1] Interestingly the majority opinion reverts to the contract law analogy in discussing this question.

mistakenly makes an offer and then withdraws it, defendant is not being deprived of a specific sentence to which he has a constitutional right.

The majority and *Cooper* make much of fairness. In *Cooper*, however, the withdrawal of the plea offer based on the superior's overruling of the subordinate is a distinct kind of unfairness to the defendant. But here a mistake by the prosecutor involves the interest not only of the defendant, but of the public as well, and has fairness implications of a far different nature. A mistake should be given different treatment from what was at best the insistance on an organizational, if not bureaucratic, prerogative.

For the foregoing reasons, I would affirm.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

GEORGE JOHNSON — APPELLANT

VS. — No. 81-2181
(Dist. Ct. No. PB-C-79-139)

JAMES MABRY, Commissioner
Arkansas Department of Correction — APPELLEE

PETITION FOR REHEARING EN BANC

PRELIMINARY STATEMENTS: **This petition is submitted pursuant to Rule 35 of the Federal Rules of Appellate Procedure and Rule 16 of the Rules of the United States Court of Appeals for the Eighth Circuit. Appellee**

seeks reconsideration of this Court's decision of May 6, 1983 reversing the District Court's denial of federal habeas corpus relief.

FACTUAL BACKGROUND: The appellant was convicted by a jury on November 23, 1970 of murder in the first degree and was sentenced to a term of life imprisonment. The conviction arose from an incident which occurred in a residence in Little Rock, Arkansas, described by the Arkansas Supreme Court as follows:

> Mr. and Mrs. W.A. Siscoe and their daughter Vicki arrived home from the Siscoe grocery store on the night of May 22, 1970 at about 10:45 p.m. Mrs. Siscoe drove her vehicle into the driveway, parked it and awaited her daughter and husband who followed her in a vehicle driven by the husband. He stopped his car and the daughter got out, opened the front door and entered the Siscoe dwelling. Her father heard her screaming inside the house and ran inside, armed with a .38 caliber revolver, where he became aware of the presence of an intruder who threatened to kill him and began firing a weapon. When Siscoe returned the fire, the intruder grabbed Vicki, swung her around as a body shield and a scuffle ensued during which Siscoe fired, or attempted to fire over the intruder's shoulder. Shots were fired by the father and by at least one intruder. In the exchange of gunfire, Vicki Siscoe was struck by a bullet from her father's weapon and another from a .22 caliber weapon obviously fired by the intruder. The state medical examiner testified that, in his professional opinion, Vicki's death was caused by a large caliber bullet of the same type as a .38 caliber slug exhibited to him. Both appellant, who admitted his presence in the house at the time, and W.A. Siscoe were wounded. All three wounded persons were admitted at Baptist Medical Center, where Vicki Siscoe died. ***Johnson v. State***, **252 Ark. 1113, 1114 (1972).**

Subsequent to his conviction for murder, the appellant was, on June 15, 1971, found guilty of burglary and assault with intent to kill (re: Mr. Siscoe) and was sentenced to 21 years. In July 1972, the Arkansas Supreme Court reversed the conviction for first degree murder due to the trial court's failure to give a requested jury instruction. *Johnson v. State*, 252 Ark. 1113 (1972).

Shortly after the murder conviction was reversed, the public defender was appointed to represent the appellant upon retrial. On Friday, October 27, 1972, a deputy prosecuting attorney offered the public defender a plea proposal consisting of a 21 year sentence to be served concurrently with the 21 year sentence appellant was serving for burglary and assault. The next day the public defender journeyed to the penitentiary where he visited with appellant regarding the offer. In his discussion with counsel, appellant agreed to enter a plea of guilty in exchange for a 21 year concurrent sentence.

On Monday, October 30, 1972, the next working day after the offer had been made, the public defender called the prosecutor's office for the purpose of accepting the plea offer. The public defender was informed that a mistake had been made and that the sentence could not be made concurrent but rather, would have to be *consecutive* to the previous 21 year sentence. Thereafter, the case was assigned to the chief deputy public defender.

A trial date of November 8, 1972 was set for appellant's case. On November 9, a mistrial was declared and the case was reset for December 7 and 8, 1972. The case was again continued to February 26, 1973. On February 26, 1973, the appellant entered a plea of guilty to the charge of accessory after a felony murder and was sentenced to a term of 21 years, to be served consecutive to his previously imposed 21 year sentence.

State post-conviction relief was denied by the trial court and by the Arkansas Supreme Court in 1978. Appellant's petition for writ of habeas corpus was filed on August 21, 1978. On August 10, 1979, the District Court allowed the appellant to amend his petition to allege an unlawfully induced and involuntarily made guilty plea and ineffective assistance of counsel.

Subsequent to the initial hearing in this cause which included testimony concerning the conflicting allegations of (1) unlawfully induced/coerced guilty plea and (2) failure to receive the sentence he bargained for, the appellant submitted a post-hearing brief wherein he asserted an alternative ground for relief never before presented and which was inconsistent with his earlier grounds—to wit: that he had a constitutional right to enforce the original offer made by the deputy prosecuting attorney. The District Court ultimately rejected appellant's allegations with regard to the guilty plea and denied the requested relief. *Johnson v. Mabry*, F. Supp. ____ (Sept. 16, 1981).

On appeal to this Court, the panel overturned the decision of the District Court and ordered specific performance of the proposed plea agreement in spite of the fact that there had been no showing that the accused relied to his detriment on the proposed offer.

REASONS FOR REHEARING EN BANC: The instant case raises the following constitutional question of exceptional importance: In the absence of a showing of detrimental reliance or resultant prejudice, and prior to the entry of a guilty plea, does a defendant have a constitutional right to specific performance of a plea proposal which was made on Friday and withdrawn the following Monday due to a mistake on the part of the prosecuting attorney?

ARGUMENT IN SUPPORT OF REHEARING: In its May 6, 1983 opinion, this Court acknowledged that the plea

proposal (21 years concurrent) was conveyed to appellant's counsel on Friday; that on the following Monday, appellant attempted to accept the plea proposal; that the prosecuting attorney indicated that a mistake had been made and the sentence must be consecutive rather than concurrent; that the appellant did not enter a plea of guilty in reliance on the proposal; and that the appellant had not performed any specific action in reliance upon the plea. See Slip Opinion at pp. 8-9 and f.n. 8. The Court did find however that the appellant relied on the plea proposal to the extent that he considered the terms offered, agreed to accept the proposal and communicated his willingness to plead guilty to the prosecuting attorney. The Court concluded, "We will not allow the government to take advantage of (appellant's) acceptance of the plea proposal, in the absence of any change in the underlying circumstances, and to exploit the (appellant's) decision to plead guilty by further hard bargaining and by recommending a longer sentence. Slip Op. at p. 15.

Appellee respectfully submits that the Court's assertion that the government sought to take advantage of appellant's willingness to accept the proposal and to engage in further hard bargaining in the absence of any change in the circumstances is totally without support in the record. Appellant had been convicted of burglary and assault with intent to kill in connection with the incident at the Siscoe home and had received concurrent sentences of 21 and 12 years. He had also been convicted of first degree murder and sentenced to life imprisonment for the death of Vicki Siscoe, but the conviction was reversed due to an error in submission of jury instructions. Prior to his retrial, a deputy prosecuting attorney proposed to recommend a 21 year concurrent sentence in exchange for a plea of guilty to accessory after felony murder. Testimony at the hearing in the District Court revealed that the deputy prosecutor had made a mistake in offering the concurrent sentence on the lesser charge rather than a consecutive sentence. When these facts are considered, the question as to whether the

change in the terms of the plea proposal from concurrent to consecutive was based upon a mistake having been made (as the testimony indicated) or based upon unscrupulous and unjustified actions of the government (as suggested by the Court) is easily resolved. See also, dissenting opinion at Slip Op. p. 17-18.

Appellee does not take issue with the Court's assertion that there must be fairness in plea bargaining. Indeed, since the decision in *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), fairness in plea bargaining has been viewed as having constitutional dimensions. Appellee submits however that fairness is an objective concept which must innure to the benefit of not only the defendant, but the interests of the public and its government as well.

It is clear from reading the *Santobello* decision that reliance upon the plea proposal is a necessary prerequisite to specific enforcement thereof. The Supreme Court wrote: "When a plea rests in a significant degree on a promise or agreement of the prosecutor so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 404 U.S. at p. 262. The crux of the *Santobello* opinion is that although the accused has no right to have a plea accepted, once a bargain is struck and the accused detrimentally relies upon such agreement, the accused has the right to hold the prosecutor to his end of the bargain.

Of course, *Santobello* concerned a fact situation in which a plea had already been entered and thus is not directly on point with the present case. However, in *Virgin Islands v. Scotland*, 614 F.2d 360 (3d Cir. 1980) the court adopted the *Santobello* rationale of requiring a showing of detrimental reliance upon the plea proposed as a prerequisite to ordering specific performance in a case in which the government attempted to add additional conditions to a plea proposal after the accused indicated his acceptance, but before entry of a guilty plea. Numerous state courts are

in accord. Consider: *People v. Barnett*, 113 Cal. App. 3d 563; *Shields v. Delaware*, 374 A.2d 816, cert. den. 434 U.S. 893; *State v. Reasbeck*, 359 So.2d 564 (Fla. 1978); *State v. Edwards*, 279 N.W.2d 9 (Iowa 1979); *People v. Heiler*, 79 Mich. App. 714, 262 N.W.2d 890 (Mich. 1977); *State v. Collins*, 300 N.C. 142, 265 S.E.2d 172 (N.C. 1980); *State v. Wheeler*, 95 Wash. 2d 799, 631 P.2d 376 (Wash. 1981); *State v. Beckes*, 100 Wis. 2d 1, 300 N.W.2d 871 (Wis. 1980).

Appellee does not suggest that the outcome of the present case should necessarily hinge upon principles of contract law. Rather, the issue should be determined in accordance with constitutional principles. As stated in *Scotland* at p. 365, detrimental reliance by the defendant implicates due process guarantees. In rendering its opinion in the present case, this Court specifically found that the appellant did not perform any action in reliance upon the plea proposal which could constitute detrimental reliance. Slip Op. at pp. 8-9. However, in spite of the lack of detrimental reliance or resultant prejudice, this Court elected to base its decision upon the government's duty to conduct plea bargaining with scrupulous fairness. Slip Op. at p. 13. The Court further implies at page 15 of the Slip Opinion that the government in this case exploited the appellant's decision to plead guilty by further hard bargaining. There is not so much as a scintilla of evidence in this record to demonstrate that the government was unscrupulous or that it sought to exploit the defendant. The testimony revealed that a mistake had occurred, and upon review of the facts the proposed offer does indeed appear to be a mistake. Although not to be condoned as a recurring practice, even a scrupulous and honorable government can make a mistake.

CONCLUSION: A period of six months time passed from the date of appellant's arraignment on charges of murder until he ultimately entered a guilty plea to the charge of accessory after felony murder. During the six month period, a state of confusion existed for approximately 72 hours – Friday until Monday – in connection with a mistaken plea pro-

posal. There has been no evidence to indicate that during this four day period the appellant in any way relied on the mistaken proposal to his detriment. There has been no evidence to demonstrate that the error was anything other than an honest mistake. Although this Court's opinion of May 6, 1983 expressly states that it is very narrow and dependent upon specific facts, the opinion establishes a precedent which runs afoul of constitutional principles. For now, in the absence of evidence to demonstrate detrimental reliance by the accused and in the absence of evidence of bad faith or unscrupulous conduct on the part of the government, this Court holds that an offered plea proposal, one part of which is made by mistake, and which exists for 72 hours over a six month period shall, as a matter of constitutional right, be specifically enforced. Appellee respectfully prays that this Court reconsider its opinion En Banc and that the judgment of the District Court be affirmed.

Respectfully submitted,

STEVE CLARK
Attorney General

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Justice Building
Little Rock, Arkansas 72201
(501) 371-2007

Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Dennis R. Molock, hereby certify that a copy of the foregoing Petition has been served upon appellant by placing a copy of same, postage paid, in the U.S. Mail addressed to Richard Quiggle, 904 W. Second Street, P.O. Box 2651, Little Rock, Arkansas 72203, this 26th day of May, 1983.

/s/ Dennis R. Molock
Dennis R. Molock

RULE 16 (d) CERTIFICATE

I hereby express my belief, based on a reasoned and studied professional judgment, that this case raises the following question of exceptional constitutional importance: Whether, as a matter of constitutional right, an accused is entitled to specific performance of a proffered plea agreement, withdrawn after 72 hours due to mistake, in the absence of any evidence to demonstrate that the accused relied upon such proffered agreement to his detriment, or evidence to demonstrate bad faith or unscrupulous conduct on the part of the government. I further express my belief that this Court's opinion in this case runs afoul of the rationale of the United States Supreme Court in *Santobello v. New York*, 404 U.S. 257 (1971); and that reconsideration by the court en banc is warranted.

/s/ Dennis R. Molock
Dennis R. Molock

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 81-2181-EA	) September Term 1982
George Johnson,	)
Appellant,	)
	) Appeal from the
vs.	) United States District
	) Court for the Eastern
James Mabry, Commissioner,	) District of Arkansas
Arkansas Department of	)
Correction,	)
	)
Appellee.	)
	)
	)

The Court, having considered appellee's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied. Judges Ross, John R. Gibson and Fagg would grant the petition for rehearing en banc.

June 30, 1983

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